Supreme Court, U.S.
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No. 09-826

# In The
# Supreme Court of the United States

DAVID K. STONE and
NICHOLAS B. LOUNDAGIN,

*Petitioners,*

v.

DEVON ENERGY PRODUCTION COMPANY, L.P.
and CARPENTER & SONS, INC.,

*Respondents.*

**On Petition For A Writ Of Certiorari**
**To The Supreme Court Of Wyoming**

## BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether this Court lacks jurisdiction under 28 U.S.C. § 1257(a) to review a federal constitutional claim that was never presented to, or decided by, the Wyoming Supreme Court.

2. Whether any compelling reasons exist for granting the petition for a writ of certiorari as set forth in Supreme Court Rule 10.

3. Whether this Court lacks jurisdiction under 28 U.S.C. § 1257(a) and Supreme Court Rule 13.1 to review a petition for writ of certiorari that was not timely filed.

4. Whether Petitioners were denied due process under the Fourteenth Amendment to the United States Constitution.

## CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent Devon Energy Production Company, L.P., a Delaware limited partnership ("DEPCO"), is a nongovernmental entity. DEPCO is owned by the following entities: Devon OEI Operating, L.L.C., a Delaware limited liability company ("OEI"), ninety-nine percent (99%); and DVN Operating Company, L.L.C., a Delaware limited liability company ("DVN"), one percent (1%). OEI owns one hundred percent (100%) of DVN. OEI is owned by Devon OEI Holdings, Inc., a Delaware corporation ("OEI Holdings"). OEI Holdings is owned by Devon Energy Corporation (Oklahoma), an Oklahoma corporation ("Devon Oklahoma"). Devon Oklahoma is owned by Devon Energy Corporation, a Delaware corporation ("Devon Energy").

Respondent Carpenter & Sons, Inc., a Wyoming corporation ("Carpenter"), is a nongovernmental corporation. There is no parent corporation or publicly held corporation that owns ten percent (10%) or more of Carpenter.

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## INTRODUCTION

Respondents Devon Energy Production Company, L.P. and Carpenter & Sons, Inc. (hereinafter "Respondents") respectfully request that this Court deny the petition for a writ of certiorari filed by Petitioners David K. Stone and Nicolas B. Loundagin (hereinafter "Petitioners") seeking review of the decision of the Wyoming Supreme Court in *Stone v. Devon Energy Prod. Co., L.P.*, 216 P.3d 489 (Wyo. 2009) (hereinafter "*Stone* 2009"). In *Stone* 2009, the Wyoming Supreme Court affirmed summary judgment entered in favor of Respondents on Petitioners' claims for ejectment, trespass and conversion. In affirming the summary judgment, the Wyoming Supreme Court did not address any federal questions or constitutional claims as none were presented to it. Rather, the Wyoming Supreme Court dispensed with Petitioners' claims under state law.

The scope of this Court's jurisdiction to review state court decisions is defined by 28 U.S.C. § 1257(a). The relevant portion of that statute provides that final judgments of the highest court of a state may be reviewed by the Supreme Court by writ of certiorari: "where any title, right, privilege, or immunity is *specially set up or claimed* under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States." (emphasis added). The Wyoming Supreme Court's decision in *Stone* 2009 did not affect any title, right, privilege, or immunity specially set-up or claimed

under the United States Constitution or, for that matter, the Wyoming Constitution.

Where, as here, jurisdiction under 28 U.S.C. § 1257(a) is lacking, the petition for a writ of certiorari (hereinafter "Petition") should be denied.

## COUNTERSTATEMENT OF THE CASE[1]

This case concerns the reassignment of a state oil and gas lease which was decided on state law grounds and involved no federal questions or constitutional claims.

Petitioners' statement of the case contains a number of inaccurate and unsupported factual allegations.[2] The true facts are as follows:

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[1] References to the Petition and its Appendix are cited as "Pet." and "Pet.App." respectively.

[2] A few of the most egregious examples of Petitioners' misstatements are the following: (1) "Despite Stone and Loundagin's protests, several more wells were drilled by Devon producing revenues from the extracted natural gas exceeding $55 million." (Pet. at p. 3). There is no evidence in the state court record that the wells drilled on the State Lease produced revenues exceeding $55 million. In addition, there is no evidence in the state court record that Stone and Loundagin protested the drilling of any wells on the State Lease; (2) "When the parties' negotiations for an extension of the deadline failed, Stone sent written demand to Devon on December 6, 2001 to reassign the State Lease. This demand was ignored by Devon and, without any authorization from Stone and Loundagin, Devon began drilling a shallow well on the State Lease on March 30, 2002."

(Continued on following page)

In 1997, Petitioner David K. Stone (hereinafter "Stone") acquired a state oil and gas lease (hereinafter "State Lease") covering land located in Johnson County, Wyoming. The State Lease provided that it would remain in effect for a primary term of 5 years or so long thereafter as oil, gas and associated hydrocarbons were produced from the lands in paying quantities, and that it could be extended beyond the primary term absent production as provided by Wyoming law. The State Lease further provided that if drilling, completion, testing or reworking operations were being diligently conducted during the primary or an extended term, it would continue in effect so long as such operations continued, and as long thereafter as oil and gas were being produced in paying quantities. (Pet.App. at pp. 22-23).

Stone later assigned an undivided 50% of the operating rights under the State Lease to Stone Exploration, Inc. (hereinafter "SEI") and the other undivided 50% of the operating rights to Petitioner Nicholas B. Loundagin (hereinafter "Loundagin"). SEI and Loundagin then assigned their interests in the State Lease to Respondent Carpenter & Sons, Inc.

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(Pet. at p. 3). There is no evidence in the state court record that the parties negotiated the extension of any deadline. Furthermore, the state court record is clear that Devon did not ignore Stone's letter dated December 6, 2001. In fact, on January 3, 2002, Devon sent a letter to Stone advising him of the intent and purpose of the reassignment provision and of the activities Devon was undertaking to ensure that the State Lease did not expire.

(hereinafter "Carpenter"), subject to the reservation of an overriding royalty interest and ownership of the "deep" rights. *Id.* at p. 23.

In May of 2000, the parties entered into a supplemental agreement covering the State Lease and other leases in the area by which Respondent Devon Energy Production Company, L.P. (hereinafter "Devon") acquired most of the rights owned by Carpenter ("Supplemental Agreement"). Carpenter retained a 10% working interest. The Supplemental Agreement contained a reassignment provision which required Devon to offer in writing to SEI a reassignment of all its rights under any of the leases not later than six months prior to the expiration of each such lease. *Id.* at p. 24. At the time the parties executed the Supplemental Agreement, there was no production of oil or gas on the State Lease and the primary term would expire on April 2, 2002. *Id.*

Devon and Carpenter did not offer to reassign the operating rights under the State Lease to SEI by October 2, 2001, six months prior to the expiration of the primary term. *Id.* at p. 24. On December 6, 2001, Stone wrote to Devon advising that the primary term of the State Lease would expire in less than four months and requesting compliance with the reassignment provision in the Supplemental Agreement. Devon responded to Stone by letter dated January 3, 2002 stating that the intent of the reassignment provision is to prevent the leases from expiring and that Devon planned to take action to

prevent the State Lease from expiring. As a result, the State Lease would not expire at the end of the primary term on April 2, 2002, and therefore reassignment of the State Lease to SEI was not due. *Id.* at p. 25.

As promised, Devon began drilling operations on the State Lease on March 30, 2002, and such operations were being diligently conducted prior to the expiration of the primary term. The well was completed and production commenced by mid-April 2002. *Id.*

In 2006, with production continuing on the State Lease and Petitioners continuing to receive their overriding royalty payments from said production, Petitioners filed a complaint in the Fourth Judicial District Court of Wyoming asserting claims for breach of contract, ejectment, specific performance, trespass, conversion, an accounting and injunctive relief. *Id.* at 26. Respondents answered the complaint denying Petitioners' claims and asserted that, due to Devon's diligent operations conducted prior to the expiration of the primary term, the term of the State Lease had been extended and therefore they were not required to make a reassignment offer. On the parties' cross-motions for summary judgment, the District Court granted Respondents' motion for summary judgment on the breach of contract claim, finding that the obligation to make an offer of reassignment never arose because the term of the State Lease did not expire. *Id.* at pp. 4-5.

Petitioners appealed the District Court's order granting summary judgment to Respondents on the breach of contract claim. On April 22, 2008, the Wyoming Supreme Court issued its decision in *Stone v. Devon Energy Prod. Co., L.P.*, 181 P.3d 936 (Wyo. 2008) (hereinafter "*Stone* 2008") affirming the summary judgment entered in favor of Respondents on the breach of contract claim. *Id.* at pp. 21-45. In its decision, the Wyoming Supreme Court stated:

> . . . we can affirm a district court's summary judgment order on any basis apparent in the record. Here, Mr. Stone and Mr. Loundagin cannot allege any facts that would support a finding that they were damaged by the breach of contract. . . . In the relatively few cases involving oil and gas lease reassignment clauses, courts have unanimously held that the measure of damages for breach of the clause is the value of the lease at the time the lease terminates. . . . Here, the lease never terminated and thus, Mr. Stone and Mr. Loundagin incurred no damages. They have continued to enjoy the benefit of their bargain, e.g., the timely payment of all overriding royalties due under the lease. We have found no case in which the overriding royalty owner was deemed to have been damaged by a failure to reassign when the lease did not terminate. This is not surprising since the fundamental purpose of the reassignment clause is to protect the overriding royalty interest holder from termination of the lease – no termination, no damage.

*Id.* at p. 39 (emphasis in original) (internal citations omitted).

The Wyoming Supreme Court further stated that:

> With respect to the remaining claims for ejectment, trespass and conversion, it seems clear from the limited record before us that they, like the damages, cannot be established. . . . Throughout the contractual relationship, Devon has held the right to drill and produce from the lands subject to the lease. The reassignment clause was intended to give Mr. Stone and Mr. Loundagin the right to reassignment of the operating rights in the event it appeared the lease was going to be lost. It was not lost and Devon was operating properly as the working interest owner under the terms of the assignment. It, therefore, seems unlikely that the assignors can prove the elements of ejectment, trespass and conversion because each of these claims requires proof that Devon wrongfully entered and exercised dominion over the property to the exclusion of the assignors. However, the district court has not addressed these claims and we remand this matter for that purpose.

*Id.* at pp. 40-41.

Petitioners filed a *Petition For Rehearing* with the Wyoming Supreme Court asserting that "[t]he issue of whether Stone suffered any damages by reason of Devon's breach [of contract] was never argued or briefed before this Court or the lower court . . . The fundamental requirement of due process is

the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Id.* at p. 76. On May 20, 2008, the Wyoming Supreme Court issued an *Order Denying Petition for Rehearing* without opinion. *Id.* at pp. 19-20. This was a final judgment of the Wyoming Supreme Court which fully adjudicated Petitioners' breach of contract claim.

On remand, the parties filed cross-motions for summary judgment on the remaining claims of ejectment, trespass and conversion and the District Court granted summary judgment to Respondents. Petitioners once again appealed the decision to the Wyoming Supreme Court. *Id.* at p. 3. On October 13, 2009, the Wyoming Supreme Court issued its decision in *Stone* 2009 affirming the summary judgment entered in favor of Respondents on the remaining claims of ejectment, conversion and trespass. *Id.* at pp. 1-13.

Petitioners again filed a petition for rehearing with the Wyoming Supreme Court asserting that its decision in *Stone* 2009 "does not review or address all claims for relief in Plaintiff-Appellants' complaint." *Id.* at 65. On October 13, 2009, the Wyoming Supreme Court issued an *Order Denying Petition for Rehearing* without opinion. *Id.* at pp. 63-64. This was a final judgment of the Wyoming Supreme Court which fully adjudicated Petitioners' claims for ejectment, conversion and trespass.

## REASONS FOR DENYING THE PETITION

### I. The Question Presented in the Petition for a Writ of Certiorari Was Never Presented to, or Decided by, the Wyoming Supreme Court; Therefore, this Court Lacks Jurisdiction

Petitioners ask this Court to review a federal constitutional claim that was never presented to, or decided by, the Wyoming Supreme Court. Under 28 U.S.C. § 1257(a) and this Court's longstanding precedent, Respondents respectfully submit that this Court lacks jurisdiction to hear the claim presented for review.

In this Petition, Petitioners present for the first time the argument that "[t]he Wyoming Supreme Court's method of determining the damage issue" violated their procedural due process rights under the Fourteenth Amendment of the United States Constitution. (Pet. at p. 10). This argument is newly minted and was neither presented to, nor decided by, the Wyoming Supreme Court. Rather, the question before the Wyoming Supreme Court in *Stone* 2009 was whether, under state law, summary judgment denying Petitioners' claims for ejectment, trespass and conversion was properly entered by the District Court. (Pet.App. at pp. 1-13).

The scope of this Court's jurisdiction to review state court decisions is defined by 28 U.S.C. § 1257(a) which provides as follows:

> Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is *specially set up or claimed* under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(emphasis added).

Under 28 U.S.C. § 1275(a) and its predecessors, this Court has "unfailingly refused to consider any federal-law challenge to a state-court decision *unless the federal claim 'was either addressed by or properly presented to the state court* that rendered the decision we have been asked to review.'" *Howell v. Mississippi*, 543 U.S. 440, 443 (2005) (quoting *Adams v. Robertson*, 520 U.S. 83, 86 (1997)) (emphasis added). See also, *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969) ("It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions."); *Webb v. Webb*, 451 U.S. 493, 496-497 (1981) (It is well-settled that this Court will not review a final judgment of a state court unless "the record as a whole shows either expressly or by clear implication that the federal

claim was adequately presented in the state system."); *Mental Hygiene Dept. of California v. Kirchner*, 380 U.S. 194, 197-198 (1965) ("This Court is always wary of assuming jurisdiction of a case from a state court unless it is plain that a federal question is necessarily presented, and the party seeking review here must show that we have jurisdiction of the case.").

This Court has discussed several crucial bases for this "not pressed or passed upon" rule. See *McGoldrick v. Compagnie General*, 309 U.S. 430, 435-436 (1940). The first vital concern is comity. This Court has long held that "'it would be unseemly in our dual system of government' to disturb the finality of state judgment on a federal ground that the state court did not have occasion to consider." *Adams*, 520 U.S. at 91 (quoting *Webb*, 451 U.S. at 500); *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 79 (1988). In addition, there are other important practical considerations that this Court has noted in connection with this rule. For example, the rule protects this Court's scarce resources by avoiding unnecessary consideration of cases where state courts resolve issues in accordance with state law. *Adams*, 520 U.S. at 90-91; *Webb*, 451 U.S. at 500. The rule assists this Court by allowing for proper development and refinement of the record, including: the pertinent facts and law; the state court's reasoning for its decision; and, the issues presented by the parties. *Adams*, 520 U.S. at 91; *Bankers Life & Casualty Co.*, 486 U.S. at 79; *Webb*, 451 U.S. at 500; *Cardinale*, 394 U.S. at 439.

Clearly, these well-settled bases for declining to consider a petition such as the one presented herein are vitally important to the judiciary. This Court has concluded that scrupulous adherence to the "not pressed or passed upon" rule will "promote respect for the procedures by which our decisions are rendered, as well as confidence in the stability of prior decisions." *Illinois v. Gates*, 462 U.S. 213, 224 (1983). This conclusion is equally true and applicable in the instant case.

Supreme Court Rule 14(g)(i) compliments the "not pressed or passed upon" rule by mandating that the petitioner seeking a writ of certiorari specify: (1) the stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal question sought to be reviewed was first raised; (2) the method or manner of raising the federal question; (3) how the federal question was passed on by those courts; and (4) pertinent quotations of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari.

The wisdom of the requirements set forth in SUP. CT. R. 14(g)(i) is underscored where, as here, Petitioners have completely failed to comply with the requirements of the rule. The explanation for Petitioners' failure to comply with SUP. CT. R. 14(g)(i) is simple: there was no federal constitutional claim

presented to, or decided by, the Wyoming Supreme Court. As the state court record fully reflects, there is no discussion or decision regarding the federal constitutional claim the Petition now purports to frame. In the briefs filed with the District Court as well as the Wyoming Supreme Court in *Stone* 2009, Petitioners never mention the phrase "due process" or cite to the federal Constitution. Moreover, the Wyoming Supreme Court's decision in *Stone* 2009 does not address any federal claim nor does it cite to, refer to, rely on, or mention the federal constitution in any way. "When the highest state court is silent on a federal question before us, we assume that the issue was not properly presented . . . " *Adams*, 520 U.S. at 86-87 (citations omitted). The silence of the Wyoming Supreme Court on the federal constitutional claim flows from the fact that the case involved state law issues, not federal constitutional claims.

Pragmatically speaking, it is appropriate to place the burden on petitioners to this Court to interject the "federal" nature of any given claim into the proceedings below. Otherwise, in every direct appeal of a summary judgment in the state courts, the respondents would be forced to brief all federal constitutional claims and the state courts would be forced to address such claims regardless of whether the petitioners actually raised such claims, or, in fact, intended to do so. It would be completely unfair to place the burden on state courts to be clairvoyant by requiring them to determine whether they are inadvertently missing an opportunity to address a

federal claim. This is especially true when an unarticulated federal claim could possibly serve as a basis for reversal by this Court. Surely, if the concept of comity is to have any meaning, then a party must be required to posit a claim in the state court in such a manner as to make that court aware of the alleged federal nature of the claim. The more appropriate course of action is to continue to apply this Court's longstanding precedent, set forth above, which requires the petitioners in this Court to demonstrate that the question presented in the petition for a writ of certiorari was actually presented to and decided by the state court.

Petitioners failed to raise or present any federal constitutional claim in *Stone* 2009 and thus the Wyoming Supreme Court did not decide such a claim. For the foregoing reasons, this Court is without jurisdiction to review the claim presented herein and should deny the Petition.

## II. There are No Compelling Reasons for Granting the Petition for a Writ of Certiorari

In accord with the congressionally-mandated jurisdictional limit set forth in 28 U.S.C. § 1257(a), this Court has adopted Rule 10 which provides in pertinent part as follows:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted *only for*

> *compelling reasons*. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> (b) a state court of last resort *has decided* an *important* federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court or a United States court of appeals *has decided* an *important* question of federal law that has not been, but should be, settled by this Court, or has decided an *important* federal question in a way that conflicts with relevant decisions of this Court.

SUP. CT. R. 10 (emphasis added).

An examination of the *Stone* 2009 decision reveals that the Wyoming Supreme Court did not decide a federal question, much less, (1) an important federal question that conflicts with the decision of another state court of last resort or of a United States court of appeals; or (2) an important question of federal law that has not been, but should be, settled by this Court, or decided an important federal question in a way that conflicts with relevant decisions of this Court. Although the Petition alleges that "[t]his Court's jurisdiction is invoked under 28 U.S.C. § 1257(a)" (Pet. at p. 1), Petitioners failed to identify any federal question presented to, or decided by, the Wyoming Supreme Court in *Stone* 2009.

Therefore, there is no compelling reason for this Court to grant the Petition.

## III. Petitioners Failed to Timely File a Petition for a Writ of Certiorari Raising the Due Process Claim; Therefore this Court Lacks Jurisdiction

Petitioners filed a writ of certiorari of the Wyoming Supreme Court's October 13, 2009 decision in *Stone* 2009, which adjudicated Petitioners' state law claims for ejectment, conversion and trespass. However, the constitutional claim now raised by Petitioners relates solely to their breach of contract claim that was finally adjudicated by the Wyoming Supreme Court on May 20, 2008 in *Stone* 2008. Therefore, the Petition was not timely filed, and this Court lacks jurisdiction to hear the Petition.

SUP. CT. R. 13.1 and 28 U.S.C. § 2101(c) provide that a petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by a state court of last resort must be filed within 90 days of the entry of the judgment. This Court has repeatedly held that the filing period for civil cases is jurisdictional. See *Federal Election Comm'n v. NRA Political Victory Fund*, 513 U.S. 88, 90 (1994). Indeed, this Court's Rule 13.2 cites 28 U.S.C. § 2101(c) in directing the Clerk not to file any petition "that is *jurisdictionally* out of time." (emphasis added).

On April 22, 2008, the Wyoming Supreme Court issued its decision in *Stone* 2008 affirming the summary judgment entered in favor of Respondents on Petitioners' breach of contract claim. (Pet.App. at

pp. 21-45). The Wyoming Supreme Court stated that the basis for its decision was that Petitioners suffered no breach of contract damages because "[t]he [State] lease was not lost and they have received the overriding royalty payments due under the agreement." *Id.* at p. 40. The Wyoming Supreme Court further stated that, with respect to the remaining claims for ejectment, trespass and conversion "the district court has not addressed these claims and we remand this matter for that purpose." *Id.* at p. 41. Petitioners' assertion that the proceedings in the District Court were "for all practical purposes a declaratory judgment" is erroneous. (Pet. at p. 8). Petitioners did not bring a claim for declaratory judgment in the District Court; rather, they filed a motion for summary judgment on their breach of contract claim. (Pet.App. at pp. 103-104).

On May 7, 2008, Petitioners filed a *Petition For Rehearing* with the Wyoming Supreme Court asserting that "[t]here is nothing in the record on appeal regarding Appellants' breach of contract damages or other kinds of damages suffered by Plaintiff [sic], and thus Appellants did not have an opportunity to be heard at a meaningful time and in a meaningful manner regarding damage issues." (Pet.App. at p. 79). Petitioners filed a brief in support of their petition for rehearing wherein they asserted "[t]he issue of whether Stone suffered any damages by reason of Devon's breach [of contract] was never argued or briefed before this Court or the lower court . . . The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" (Pet.App. at p. 76). On

May 20, 2008, the Wyoming Supreme Court issued an *Order Denying Petition for Rehearing* without opinion. (Pet.App. at pp. 19-20). This was the final adjudication of the Wyoming Supreme Court on Petitioners' breach of contract claim in *Stone* 2008.

Pursuant to 28 U.S.C. § 1257(a), "[*f*]*inal judgments* or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari. . . ." (emphasis added). Petitioners assert that the Wyoming Supreme Court's decision in *Stone* 2008 "was not a final appealable order because of the remand." (Pet. at p. 5 fn. 2) (citing *Shannon v. Jack Eckerd Corp.*, 55 F.3d 561 (11th Cir. 1995); *Lofflund Bros. Co. v. Rougeau*, 655 F.2d 1031 (10th Cir. 1981)).[3] Petitioners' assertion is incorrect.

A state court judgment is denominated as "final" if the record shows that the order of the appellate court has in fact fully adjudicated rights and that adjudication is not subject to further review by a state court. *Department of Banking, State of Nebraska v. Pink*, 317 U.S. 264, 268 (1942). Where the order or judgment is final in this sense, the time for filing a petition to this Court runs from the date of the appellate court's order, since the objective of the

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[3] Petitioners' reliance on *Shannon v. Jack Eckerd Corp.*, 55 F.3d 561 (11th Cir. 1995) and *Lofflund Bros. Co. v. Rougeau*, 655 F.2d 1031 (10th Cir. 1981) is misplaced because the cases address the jurisdiction of the United States Court of Appeals under 28 U.S.C. § 1291. They do not address this Court's jurisdiction which is determined under 28 U.S.C. § 1257(a).

statute is to limit the petitioner's time to three months from the date when the finality of the judgment for purposes of review is established. *Id.*

In *Stone* 2008, the Wyoming Supreme Court fully adjudicated Petitioners' breach of contract claim. (Pet.App. at pp. 39-41). Petitioners subsequently filed a petition for rehearing claiming that their due process rights were violated because "[t]he issue of whether Stone suffered any damages by reason of Devon's breach [of contract] was never argued or briefed before this Court or the lower court." (Pet.App. at p. 76). The Wyoming Supreme Court denied the petition for rehearing without opinion, at which point a final judgment existed with respect to Petitioners' breach of contract claim. No further review or correction in any other state tribunal was available to the Petitioners with respect to their breach of contract claim. Petitioners' due process claim is tied to and arises out of the breach of contract claim adjudicated in *Stone* 2008. The due process claim is in no way related to the remanded claims of ejectment, trespass and conversion adjudicated in *Stone* 2009. In order to timely raise their due process claim, Petitioners were required to file their petition for a writ of certiorari within 90 days of the Wyoming Supreme Court's *Order Denying Petition for Rehearing* that was issued on May 20, 2008. They did not. The failure of Petitioners to timely file their Petition is jurisdictional. *Federal Election Comm'n*, 513 U.S. at 90.

Therefore, this Court lacks jurisdiction to hear Petitioners' claim alleging due process violations.

## IV. Petitioners Were Not Denied Due Process Under the Fourteenth Amendment to the United States Constitution

Petitioners assert that their procedural due process rights were violated by the Wyoming Supreme Court because they were denied the opportunity to address damages arising out of the breach of the reassignment provision found in the Supplemental Agreement. (Pet. at pp. 6-8). Petitioners' assertion is erroneous because, under well-established case law, the measure of damages for breach of a reassignment provision in an oil and gas lease is the value of the lease *at the time the lease terminates*. *Tennaco Oil Co. v. Gaffney*, 369 F.2d 306, 309 (10th Cir. 1966). See also Paul W. Easton, Jr., "*The Reassignment Provision – Meaningful or Not?*" 20 Rocky Mountain Mineral Law Institute 601, 614; James M. Colosky, "*The Reassignment Provision – The Agony in the Oversight*," Chapter 5, Rocky Mountain Mineral Law Institute 5-29.

A summary judgment hearing was held before the District Court on April 30, 2007, at which Petitioners' counsel admitted that the State Lease had never expired or terminated. (Pet.App. at p. 58 fn. 2). Based upon this admission, the Wyoming Supreme Court correctly found that "Mr. Stone and Mr. Loundagin cannot allege any facts that would support a finding that they were damaged by the breach of

contract. . . . *Here, the lease never terminated and thus, Mr. Stone and Mr. Loundagin incurred no damages*. They have continued to enjoy the benefit of their bargain, e.g., the timely payment of all overriding royalties due under the lease." *Id.* at pp. 38-39 (emphasis added).

As set forth in the *Stone* 2008 decision, the Wyoming Supreme Court "can affirm a district court's summary judgment order on any basis apparent in the record." *Id.* at p. 38. The Wyoming Supreme Court did just that when it applied an undisputed fact contained in the record (the State Lease never expired or terminated) to the applicable law (the measure of damages for breach of a reassignment provision in an oil and gas lease is the value of the lease at the time the lease terminates) to arrive at its conclusion that "[w]e have found no case in which the overriding royalty owner was deemed to have been damaged by failure to reassign when the lease did not terminate. This is not surprising since the fundamental purpose of the reassignment clause is to protect the overriding royalty interest holder from termination of the lease – no termination, no damage." *Id.* at 39.

Contrary to Petitioners' assertion, the Wyoming Supreme Court did not violate Petitioners' due

process rights and deprive them of a valuable property interest.[4]

## CONCLUSION

For all of the foregoing reasons, Respondents respectfully request that this Court deny the Petition.

Respectfully submitted,

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[4] Citing *Connecticut v. Doehr*, 501 U.S. 1 (1991), Petitioners assert that "Stone and Loundagin held a reversionary interest in these oil and gas interests that are subject to protection under the Fourteenth Amendment." (Pet. at p. 9). Petitioners' assertion is incorrect. Petitioners hold certain contract rights as defined by the Supplemental Agreement, and those rights do not include a reversionary interest. Furthermore, even a superficial analysis of the *Connecticut* decision shows that the case does not stand for the proposition Petitioners assert. In *Connecticut*, this Court held that a Connecticut state statute authorizing pre-judgment attachment of real property without prior notice or hearing or without a showing of exigent circumstances did not satisfy due process requirements. *Connecticut*, 501 U.S. at 1. The *Connecticut* decision is inapposite and has no application to the facts of this case.